

Oct 26, 2017

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAN M. RENFROE,

Plaintiff,

v.

QUALITY LOAN SERVICE CORP.
OF WASHINGTON; BANK OF
AMERICA, N.A., successor by merger
to BAC Home Loans Servicing, LP,
f/k/a Countrywide Home Loans
Servicing, LP; CITIBANK, N.A., as
trustee of NRZ Pass-Through Trust VI;
MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.;
and BANK OF NEW YORK
MELLON, as trustee on behalf of the
Certificateholders of the CWHEQ Inc.,
CWHEQ, Revolving Home Equity
Loan Trust Series 2006-C,

Defendants.

No. 2:17-CV-00194-SMJ

ORDER GRANTING IN PART
AND DENYING IN PART
PLAINTIFF'S MOTION TO
COMPEL SUPPLEMENTAL
DISCLOSURES

Before the Court, without oral argument, is Plaintiff Jan Renfroe's Motion to Compel Supplemental disclosures from NRZ Pass-Through Trust VI and Mortgage Electronic Registration Systems, Inc. ECF No. 47. Plaintiff alleges that Defendants Citibank, N.A., as trustee for NRZ Pass-Through Trust VI (Citibank) and Mortgage Electronic Registration Systems, Inc. (MERS) (collectively, Defendants) violated

1 Rule 26 by failing to properly disclose the witnesses upon which it intended to rely
2 or the documents it intended to use in support or defense of claims as required under
3 Federal Rule of Civil Procedure 26. Defendants assert that they have properly
4 disclosed all information required under Rule 26 and that Plaintiff's further requests
5 for information must be sought through formal discovery. Both parties move for
6 fees.

7 **BACKGROUND**

8 Plaintiff filed her initial complaint in this matter in Okanogan County
9 Superior Court on April 3, 2017. On June 1, 2017, Defendants filed their notice of
10 removal to this Court pursuant to 28 U.S.C. § 1132. The complaint alleges
11 numerous causes of action against various financial institutions and other
12 organizations involved in the issuance of, and subsequent foreclosure upon, a
13 refinance loan secured by Plaintiff's home. Plaintiff alleges that each defendant
14 failed to comply with the Washington Deed of Trust Act, that certain defendants
15 violated the Washington Consumer Protection Act. Plaintiff seeks declaratory and
16 injunctive relief, and quiet title in her name.

17 The Court ordered the parties to exchange Rule 26(a)(1) initial disclosures
18 no later than July 21, 2017. ECF No. 10. At the August 4, 2018 scheduling
19 conference, the parties indicated that they had not exchanged initial disclosures as
20

1 required by the scheduling conference notice. The Court required the parties to
2 exchange initial disclosures no later than August 8, 2011. ECF No. 31 at 2.

3 On June 25, 2017, counsel for Citibank and MERS emailed Plaintiff's
4 counsel Defendants' initial disclosures. Defense counsel used one of the three email
5 addresses listed by Plaintiff's counsel, Mr. Hunter, in the Court's Electronic Filing
6 System for this matter. Plaintiff's counsel represents that does not regularly monitor
7 this email and did not discover the email containing the disclosures until mid-
8 September, 2017.

9 On September 21, 2017, Mr. Hunter and Defendants' counsel, Mr. McIntosh,
10 met pursuant to Fed. R. Civ. P. 37 to discuss what Mr. Hunter perceived as
11 inadequacies in Defendants' initial disclosures. Mr. McIntosh maintains that the
12 initial disclosures are adequate and that Plaintiff must seek more detailed
13 disclosures through formal discovery.

14 Defendants moved for summary judgment, ECF No. 4, and a hearing on the
15 summary judgment motion is scheduled for November 21, 2017. Plaintiff maintains
16 that the supplemental disclosures are necessary in defending against Defendants'
17 motion for summary judgement.

18 **LEGAL STANDARD**

19 Federal Rule of Civil Procedure 26 requires parties to disclose the name of
20 "each individual likely to have discoverable information—along with the subjects

1 of that information—that the disclosing party may use to support its claims or
2 defenses.” Parties must also provide copies or descriptions of “all documents,
3 electronically stored information, and tangible things that the disclosing party has
4 in its possession, custody, or control and may use to support its claims or defenses.”

5 Rule 26(e) imposes a continuous duty on all parties “to supplement at
6 appropriate intervals its disclosures under subdivision (a) if the party learns that in
7 some material respect the information disclosed is incomplete or incorrect and if
8 the additional or corrective information has not otherwise been made known to the
9 other parties during the discovery process or in writing.”

10 Rule 37(a)(2) provides that if a party fails to make a Rule 26(a) disclosure,
11 any other party may compel disclosure or move for sanctions. The Court has
12 broad discretion to fashion appropriate sanctions under Rule 37, which includes
13 the power to exclude the evidence at issue, impose fines, or order the non-moving
14 party to pay the moving party’s costs and fees. Fed. R. Civ. P. 37(a)(1)(A)–(C).

15 **DISCUSSION**

16 Plaintiff alleges Defendants breached their disclosure obligations under
17 Rule 26 in three ways: (1) Defendants failed to properly disclose the names and
18 contact information of individuals likely to have discoverable information; (2)
19 Defendants failed to make available to Plaintiff the documents upon which
20 Defendants plan to rely; and (3) Defendants failed to provide a computation of

1 damages or make available to the Plaintiff the documents upon which it relied in
2 making its calculation. Plaintiff also objects to Defendants' use of email as a
3 method of service for documents not filed with the Court. Defendant is correct
4 that Defendants should not have served their initial disclosures electronically
5 without written consent. With respect to the initial disclosures themselves,
6 Plaintiff's objections to Defendants identification of certain witnesses has merit.
7 However, her second and third claims appear to be matters that could have been
8 properly resolved by the parties without resort to judicial intervention.
9 Accordingly, the Court grants Plaintiff's motion to compel with respect to the
10 names and contact information of individuals, but denies the remainder of the
11 motion.

12 **A. Defendants must comply with Federal Rules of Civil Procedure 5 when**
13 **serving papers not filed with the Court.**

14 Plaintiff objects to Defendants' use of email in serving its initial disclosures.
15 Plaintiff correctly argues that electronic service is permissible only when the party
16 to be served has consented to such service in writing. Fed. R. Civ. P. 5(b)(2)(E).
17 Defendants' use of email is therefore inappropriate without Plaintiff's written
18 consent.

19 Defendants' mistake is understandable, however, in light of the Rule 5(b)(3),
20 which permits parties to use the court's electronic transmission facilities to make
service. When parties register with the Court's electronic filing system, they consent

1 to electronic service of all documents filed with the Court. Although this consent
2 extends only to those documents filed with the Court, it is an understandable and
3 fairly common mistake for a party to misunderstand consent to electronic service
4 for court documents as a blanket consent to electronic service for all documents.

5 Plaintiff does not appear to request sanctions for this violation and none are
6 appropriate under the circumstances. Going forward, Defendants are directed to
7 serve Plaintiff in a manner compliant with Federal Rule of Civil Procedure 5.

8 **B. Defendants' identification of certain individuals as "publicly available"**
9 **is insufficient under Rule 26.**

10 Plaintiff first argues that Defendants violated their Rule 26 obligations by
11 failing to provide the names and contact information of individual as required under
12 the Rules. In their initial disclosures, Defendants identified seven individuals and
13 entities with potentially discoverable information. ECF No. 37-1 at 2–3. With
14 respect to two of the entities, Federal National Mortgage Association (Fannie Mae)
15 and Nationstar Mortgage, LLC (Nationstar), Defendants' did not identify a specific
16 individual or provide contact information, but instead listed the contact as "Publicly
17 available." *Id.* Because Rule 26 imposes a duty of reasonable investigation, Plaintiff
18 is correct that Defendants' disclosures regarding Fannie Mae and Nationstar are
19 insufficient.

20 Rule 26(a)(1)(A)(i) requires parties to disclose "the name and, if known, the
address and telephone number of each individual likely to have discoverable

1 information . . . that the disclosing party may use to support its claims or
2 defenses” This mandatory early disclosure extends to all information
3 reasonable available to the party. Fed. R. Civ. P. 26(a)(1)(E). “Reasonably
4 available” includes information known to a party, its agents and counsel, as well as
5 information obtainable through reasonable investigation.” *See* Adv. Comm. Notes
6 to 1993 Amendment to Fed. R. Civ. P. 26(a).

7 Here, Defendants failed to disclose the names and contact information for
8 specific individuals from Fannie Mae and Nationstar, which were reasonably
9 available to Defendants through reasonable investigation. Defendants argue that
10 “no one from Citibank has any personal knowledge of this loan or the allegations
11 of wrongdoing in the complaint.” ECF No. 49 at 4. However, this argument is
12 irrelevant to the disclosures at issue. Rule 26 does not require that a party have
13 personal knowledge of all events related to the litigation. It does, however, require
14 parties to provide the names and contact information of parties it believes have
15 potentially discoverable information that the disclosing party may use to support its
16 claim. If Citibank intends to use information that may be available from individuals
17 at Fannie Mae or Nationstar to defend against Plaintiff’s claims, it must disclose
18 those individuals without waiting for a discovery request.

19 Accordingly, the Court finds Defendants’ failure to identify specific
20 individuals within Fannie Mae and Nationstar is a violation of Rule 26. Defendants

1 must supplement their initial disclosures to provide Plaintiff with specific contact
2 information for representatives from Fannie Mae and Nationstar.

3 **C. Plaintiff has not shown that Defendants have failed to make the loan file**
4 **unavailable for inspection or copying.**

5 Plaintiff next asserts that Defendants violated Rule 26 by failing to identify
6 the location of the loan file in Citibank's possession. Under Rule 26(a)(1)(A)(ii),
7 parties "must provide a copy—or a description by category and location—of all
8 documents . . . that the disclosing party has in its possession, custody, or control and
9 may use to support its claims or defenses." Here, Defendants' initial disclosures
10 identified only the "loan file" and did not describe the location of the file. This
11 disclosure is insufficient under Rule 26.

12 It is unclear, however, whether Defendants failed to supplement the
13 disclosures as Plaintiff alleges. Rule 26(e) provides that a party must supplement or
14 correct disclosures in a timely manner if the information "has not otherwise been
15 made known to the other parties." Mr. Hunter acknowledges that his assistant called
16 Mr. McIntosh to arrange a time to view the original Note. However, the initial
17 disclosures do not identify the Note separately from the Loan File. The facts
18 available to the Court therefore suggest that Mr. Hunter understood the Note to be
19 contained within the Loan File. This reading is also consistent with Mr. McIntosh's
20 recollection that Mr. Hunter's assistant called to set up a time to view the Loan File.
Mr. Hunter's correspondence with Mr. McIntosh therefore suggests he had

1 knowledge that the Loan File was located at Mr. McIntosh's office. Accordingly, it
2 is not clear that Defendants had a duty to supplement their disclosures with the
3 location of the loan file.

4 If they have not already done so, Defendants shall provide a written
5 description of the location of the Loan File on or before October 27, 2017. The
6 Court expects that there will be no further disputes regarding the inspection of the
7 Loan File or its contents.

8 **D. Defendants' are not claiming any damages and therefore need not**
9 **disclose any information on this point.**

10 Finally, Plaintiff argues that Defendants failed to comply with Rule 26 by
11 failing to give a computation of each category of damages claimed and failing to
12 make available for inspection and copying the documents on which the damages
13 computation is based. Under Rule 26, a party must disclose a "computation of each
14 category of damages *claimed by the disclosing party.*" Fed. R. Civ. P.
15 26(A)(1)(a)(iii) (emphasis added). Defendants are not claiming any damages. This
16 rule therefore does not apply. To the extent Plaintiff seeks information relating to
17 the computation of Ms. Renfroe's outstanding loan balance, initial disclosures on
18 this claim are not the proper mechanism to compel such information.

1 **E. Because Plaintiff partially prevailed on the motion, Plaintiff is entitled**
2 **to recover a portion of the reasonable costs and fees associated with**
3 **brining the motion.**

4 Plaintiff's motion to compel is not without merit. Plaintiff is correct that
5 Defendants' did not technically comply with the rules of service when providing
6 their initial disclosures. It appears that Plaintiff made reasonable efforts to confer
7 with Defendants regarding the identification of Fannie Mae and Nationstar before
8 filing this motion. Accordingly, the Court will impose sanctions on Defendants for
9 the Rule 26 violation.

10 However, Plaintiff is not entitled to the full \$600 requested in the motion.
11 While one of Plaintiff's arguments was successful, the other two were unwarranted
12 and almost entirely meritless. At best, Plaintiff's objection to Defendants damages
13 calculations represents a misunderstanding of the rules that could have been
14 remedied through diligent reading of the text before turning to the Court. The Court
15 is also skeptical that the issue of the Loan File review could not be resolved without
16 resort to judicial intervention. Accordingly, the Court will reduce the fee award to
17 \$200.

18 For the foregoing reasons, **IT IS HEREBY ORDERED:**

19 **1. Plaintiff's Motion to Compel Supplemental Disclosures, ECF No. 47, is**
20 **GRANTED in part and DENIED in part.**


1 **A.** Defendants shall not serve documents that are not filed with the Court
2 using electronic means unless Plaintiff provides written consent to
3 electronic service pursuant to Fed. R. Civ. P. 5(b)(2)(E).

4 **B.** Defendants shall provide supplemental disclosures regarding contact
5 persons for Fannie Mae and Nationstar on or before **November 3,**
6 **2017.**

7 **C.** Defendants shall provide a written description of the location of the
8 loan file on or before **November 3, 2017.**

9 **D.** Defendants shall **REIMBURSE** Plaintiff in the amount of **\$200.00** for
10 the costs and fees associated with bringing this motion.

11 **DATED** this 26th day of October 2017.

12 
13 SALVADOR MENDOZA, JR.
14 United States District Judge